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DATO' SRI ANDREW KAM TAI YEOW v. RAUB MINING & DEVELOPMENT COMPANY SDN BHD & ANOR AND OTHER APPEALS

B

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
NOR BEE ARIFFIN JCA
DARRYL GOON SIEW CHYE JCA
[CIVIL APPEAL NOS: W-02(IM)(NCC)-1687-11-2020, W-02(IM)(NCC)-1705-11-2020, W-02(IM)(NCC)-1706-11-2020, W-02(IM)(NCC)-1707-11-2020 & W-02(IM)(NCC)-1708-11-2020]
15 JUNE 2022

C

Abstract – *Income tax documents, which are tax returns and other documents made for the purposes of the Income Tax Act 1967 ('ITA') and relating to the income of the companies and/or information or other matter or thing which comes to the notice of the tax agent (a classified person) in its capacity as such, are classified materials under the ITA. Pursuant to s. 138(2) of the ITA, these tax documents are prohibited from being produced or used in court. The language of the statute ('No classified material shall be produced or used …') is imperative and therefore the prohibition is mandatory.*

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CIVIL PROCEDURE: *Affidavit – Supplementary affidavits – Income tax documents sought to be adduced vide supplementary affidavits – High Court granted leave for filing supplementary affidavit but disallowed tax documents and ordered them to be expunged from court's records – Appeal against – Whether tax documents prohibited from use in court – Tax documents received from taxpayers' tax agents – Whether tax agent fell within definition of 'classified person' under s. 138(5) of Income Tax Act 1967 ('ITA') – Whether tax documents 'classified material' under ITA – Whether prohibition mandatory – Whether written authority or consent of taxpayers obtained before producing tax documents in court – Whether tax documents inadmissible under s. 138 of ITA*

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REVENUE LAW: *Income tax – Documents – Income tax documents sought to be adduced vide supplementary affidavits – High Court granted leave for filing supplementary affidavit but disallowed tax documents and ordered them to be expunged from court's records – Appeal against – Whether tax documents prohibited from use in court – Tax documents received from taxpayers' tax agents – Whether tax agent fell within definition of 'classified person' under s. 138(5) of Income Tax Act 1967 ('ITA') – Whether tax documents 'classified material' under ITA – Whether prohibition mandatory – Whether written authority or consent of taxpayers obtained before producing tax documents in court – Whether tax documents inadmissible under s. 138 of ITA*

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There were five appeals filed by the appellant which were heard together before this court. As agreed by the parties, this court would hear Appeal 1687 from originating summons ('OS 574') and the decision would apply to other appeals. The respondents, Raub Mining & Development Company Sdn Bhd ('RMDC') and Raub Oil Mill Sdn Bhd ('ROM'), filed OS 574 for, *inter alia*, a declaration that the appellant ('Andrew Kam') had retired by rotation and vacated his office as their director pursuant to their respective articles of association. Andrew Kam had filed OS 577 and OS 579 for an order for him to inspect the accounting records of RMDC and ROM respectively. RMDC and ROM resisted the applications on grounds that Andrew Kam had retired and was no longer their director, and that his application was an improper collateral purpose which would be detrimental to the companies. The parties had completed the exchange of affidavits pursuant to the directions given by the High Court. Andrew Kam then obtained the respective respondents' tax documents from their tax agents without the respondents' consent or authorisation. The tax documents comprised of the respondents' tax returns, submissions, computations and/or other tax documents prepared and/or submitted by their tax agents and/or instructions received by the tax agents from them in the course of preparation of the said documents ('tax documents'). Thereupon, Andrew Kam applied to the High Court for leave to file a supplementary affidavit exhibiting the tax documents in all the five summonses. The companies opposed the application on the ground that, *inter alia,* the tax documents were classified material as defined in s. 138(5) of the Income Tax Act 1967 ('ITA'). The High Court granted leave for the filing of the supplementary affidavit but disallowed the tax documents and those parts of the affidavit referring to the tax documents and ordered that they be expunged from the court's records. Hence, these appeals. The sole question before this court was whether the tax documents sought to be adduced by the appellant in the said OS actions were prohibited from use in court and/or inadmissible under s. 138 of the ITA. At the outset, the respondents raised a preliminary objection that the appellant's appeal was defective on the ground that the other part of the decision which also disallowed and expunged those parts of the supplementary affidavit that referred to the tax documents was not stated in the notice of appeal.

Held (dismissing appeal with costs)
Per Kamaludin Md Said CJA delivering the judgment of the court:

(1) The respondent's objection to the appellant's notice of appeal being defective was a trivial issue. What was important was that there was an appeal against the High Court's decisions which disallowed the tax documents and ordered that they be expunged from the court's records based on the finding that the tax documents fell within the definition of 'classified materials' as defined under s. 138(5) of the ITA. If the tax

documents were not allowed to be adduced in evidence, it certainly followed that those parts of the affidavit referring to the tax documents would have no evidential value and could not be used to prove the existence of those tax documents which had been expunged from the court's records. They were inter-related. Further, if the appellant succeeded in the appeal and the decision of the judge in refusing to allow the tax documents to be adduced in evidence under s. 138 of the ITA was found to be erroneous, the order of the High Court would be set aside and the appellant's application to adduce tax documents and those parts of the affidavit referring to the tax documents would be allowed and adduced in evidence before the High Court in its entirety. There was thus no merit in the preliminary objection raised by the respondent. The notice of appeal filed by the appellant was sufficient and not defective. The preliminary objection was dismissed. (paras 8-10)

(2) Section 138 of the ITA is very clear and unambiguous. Section 138(5) of the ITA provides the definition of 'classified materials' and the words 'classified person' in s. 138(5) is defined under s. 138(2). These words are very pertinent. They are not to be given some other meaning. 'Classified material' cannot be declassified by an illegal act. Section 138(2) of the ITA operates to prohibit its use or production in court unless the taxpayer consents to their production. Section 117(1A) prohibits the appellant from using, producing or disclosing the tax documents. (paras 42 & 44)

(3) The appellant received the tax documents from the respondents' tax agent. Based on s. 138(5) of the ITA, the respondents' tax agent clearly fell under the definition of 'classified person.' Therefore, the tax documents, which were tax returns and other documents made for the purposes of the ITA and relating to the income of the companies, and/or information or other matter or thing which came to the notice of the tax agent (a classified person) in its capacity as such, were 'classified material' under the ITA. As such, pursuant to s. 138(2) of the ITA, the tax documents were prohibited from being produced or used in court. The language of the statute ('No classified material shall be produced or used ...') was imperative and therefore the prohibition was mandatory. (paras 48 & 49)

(4) Section 138(2) of the ITA absolutely excludes any exercise of judicial power to admit the tax documents save only where the exceptions apply. It was obvious that none of the exceptions applied here. Under s. 138(2)(c) of the ITA, in order to produce or use a classified material in court, the appellant must obtain written authority of 'the person to whose affairs it relates.' Here, 'person' includes a company (s. 2 of the ITA). It is imperative upon the appellant to obtain written authority or

consent from the respondents before he may produce their tax documents in court. No such written authority had been or would be given to him. (paras 51 & 52)

(5) The High Court was correct in rejecting the appellant's contention that s. 138(2) of the ITA did not apply against him as he was not a 'classified person' as defined under s. 138(5) of the ITA. The appellant had obtained the classified material which were prepared for the purpose of the ITA (the tax documents) from the classified persons (the tax agents) without the consent and authority of the tax payers (the respondents) and was therefore in contravention of s. 138(1) of the ITA. (para 53)

(6) The tax documents shall not be allowed to be adduced in evidence and to be expunged in its entirety on grounds that the tax documents were documents that were made for the purposes of the ITA and relating to the income of the respondents, and they contained information which had come to the notice of official of the Inland Revenue Board and the respondents' tax agent, both of whom were defined as 'classified person' under s. 138(5). These documents fell within the definition of 'classified materials' under s. 138(5) of the ITA. (para 58)

Case(s) referred to:

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Ibrahim Ismail & Anor v. Hasnah Puteh Imat & Anor And Another Appeal [2004] 1 CLJ 797 CA ***(refd)***
In Re Consolidated Nickel Mines Ltd [1914] 1 Ch 883 ***(refd)***
Ketua Pengarah Hasil Dalam Negeri v. Bar Malaysia [2022] 1 CLJ 81 CA ***(refd)***
Kuruma v. R [1955] AC 197 ***(refd)***
Lonrho PLC v. Fayed & Ors (No. 4) [1994] QB 775 ***(refd)***
Low Cheng Soon v. TA Securities Sdn Bhd [2003] 1 CLJ 309 CA ***(refd)***
Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***
Palaniappa Chettiar v. Tan Jan & Anor [1964] 1 LNS 130 FC ***(refd)***
Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***
PP v. Chew Siew Luan [1982] CLJ 354; [1982] CLJ (Rep) 285 FC ***(refd)***
Sharif Bungsu Sharif Zen & Anor v. PP [1999] 1 LNS 47 HC ***(refd)***
Tan Sri Dato' Wan Sidek Wan Abdul Rahman v. Rahman Hydraulic Tin Bhd [2012] 8 CLJ 801 CA ***(refd)***

Legislation referred to:

Civil Law Act 1956, ss. 7(3)(iv)(d), 28A(2)(d)
Companies Act 2016, s. 245(4)
Income Tax (Amendment) Act 1996, s. 5
Income Tax Act 1967, ss. 2, 77A, 117(1A), 138(1), (2)(c), (5)
Rules of Court 2012, O. 41 r. 5
Rules of the Court of Appeal 1994, rr. 5(4), 18(4)(c)

For the appellant - Palpanaban Devarajoo, Mathew Thomas Philip, Kian Yip Kenny Lam, Ahmad Iyas Husni, Voon Su Huei, Yeoh Ean Cheen & Nicholas Navaron Chula; M/s Thomas Philip

For the respondents - Gopal Sri Ram, Wong Yee Chue, Yasmeen Soh Sha-nisse, How Li Nee, Lai Wing Ee & Phoon Mei Ee; M/s YC Wong

[Editor's note: For the High Court judgment, please see Raub Mining & Development Company Sdn Bhd & Anor v. Dato' Sri Andrew Kam Tai Yeow [2021] 1 LNS 81 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Kamaludin Md Said JCA:

Introduction

[1] There are five appeals filed by the appellant which are heard together before this court. They are as follows:

(i) Appeal No. W-02(IM)(NCC)-1687-11-2020 ("Appeal 1687") from Originating Summons WA-24NCC-574-10-2019 ("OS 574") where the appellant is the defendant and the respondents, Raub Mining & Development Company Sdn Bhd ("RMDC") and Raub Oil Mill Sdn Bhd ("ROM") are the plaintiffs;

(ii) Appeal No. W-02(IM)(NCC)-1705-11-2020 ("Appeal 1705"), from Originating Summons WA-24NCC-579-10-2019 ("OS 579") where the appellant is the plaintiff and the respondent, ROM is the defendant;

(iii) Appeal No. W-02(IM)(NCC)-1706-11-2020 ("Appeal 1706"), from Originating Summons WA-24NCC-642-11-2019 ("OS 642") where the appellant is the defendant and the respondents, Grandfoods Sdn Bhd ("GF") and Granny's Kitchen Sdn Bhd ("GK") are the plaintiffs;

(iv) Appeal No. W-02(IM)(NCC)-1707-11/2020 ("Appeal 1707"), from Originating Summons WA-24NCC-577-10/2019 ("OS 577") where the appellant is the plaintiff and the respondent, RMDC is the defendant; and

(v) Appeal No. W-02(IM)(NCC)-1708-11-2020 ("Appeal 1708"), from Originating Summons WA-24NCC-609-11-2019 ("OS 609") where the appellant is the defendant and the respondent, Lead Enterprises Sdn Bhd ("LEAD") is the plaintiff.

[2] There is only one ground of judgment written by the learned judge for purposes of these appeals. The parties took the position that the issues involved in the five appeals are the same, and the appellants and respondents in these appeals are represented by the same counsel and solicitors and the submissions will be taken as the submissions for all the appellants and respondents in all the appeals.

[3] For purposes of this appeal, and as agreed to by the appellants and the respondents, this court will hear Appeal 1687 from Originating Summons WA-24NCC-574-10-2019 ("OS 574") and the decision would also apply to other appeals.

[4] In this appeal, the appellant is the defendant or "Andrew Kam" and the respondents are the plaintiffs or the first plaintiff as "RMDC" and the second plaintiff as "ROM" respectively.

[5] In the High Court, the appellant *ie*, Andrew Kam had applied for leave to file a supplementary affidavit exhibiting the respective respondents' tax documents in the five summonses. The High Court granted leave for the filing of the supplementary affidavit but ordered that the tax documents and those parts of the supplementary affidavit which referred to the tax documents be expunged from the court's records on the ground that they are prohibited under s. 138(2) of the Income Tax Act 1967 ("ITA") from being produced or used in court. These are the appellant's appeals against that part of the High Court's decisions which disallowed the tax documents and ordered that they be expunged from the court's records.

[6] At the outset, the respondents raised a preliminary objection that the appellant's appeal is defective on ground that the other part of the decision which also disallowed and expunged those parts of the supplementary affidavit that referred to the tax documents is not stated in the notice of appeal. In the notice of appeal, the appellant specifically states that he appeals against only that part of the High Court's decision which disallowed and expunged the tax documents exhibited in the supplementary affidavit.

[7] It was contended that the exhibits cannot stand alone in an affidavit without references being made in the affidavit to them. It was submitted that the notice of appeal is non-compliance with r. 5(4) of the Rules of the Court of Appeal 1994 which states that "any appellant may appeal from the whole or part of a judgment or order and the notice of appeal shall state whether the whole or part only, and what part, of the judgment or order is complained of ". The word "shall" used in r. 5(4) shows that the rule is mandatory and must be strictly adhered to. See *Low Cheng Soon v. TA Securities Sdn Bhd* [2003] 1 CLJ 309; [2003] 1 MLJ 389, 394. Exhibits form as much part of the affidavit as if they had been actually annexed to and filed with it. See *Palaniappa Chettiar v. Tan Jan & Anor* [1964] 1 LNS 130; [1965] 1 MLJ 182, 183. The appeal is therefore of no utility, inefficient and defective. On this ground, it is submitted that this appeal ought to be struck out *in limine*.

[8] We have considered the point raised and, in our view, the respondents' objection to the appellant's notice of appeal being defective for the reasons given by them is a trivial issue. What is important is that there is an appeal against the High Court's decisions which disallowed the tax documents and ordered that they be expunged from the court's records based on the finding that the tax documents fell within the definition of "classified materials" as defined under s. 138(5) of the ITA.

[9] It is also our view that if the tax documents were not allowed to be adduced in evidence, it certainly follows that those parts of the affidavit referring to the tax documents will have no evidential value and cannot be used to prove the existence of those tax documents which have been expunged from the court's records. They are inter-related. Further, if the appellant succeeds in the appeal and the decision of the learned judge in refusing to allow the tax documents to be adduced in evidence under s. 138 of the ITA is found to be erroneous, the order of the High Court would be set aside and the appellant's application to adduce tax documents and those parts of the affidavit referring to the tax documents would be allowed and adduced in evidence before the High Court in its entirety.

[10] We find there is no merit in the preliminary objection raised by the respondent. In our view, the notice of appeal filed by the appellant is sufficient and not defective. We dismissed the preliminary objection and proceeded to hear the merits of the appeal.

[11] On the merits of the appeal and having considered the submissions oral and written from the appellant and respondents, we find there is no appealable error in the decision of the learned judge. We agree with the High Court's decision and affirm the order made by the learned judge. It is also our view that the purpose or intention of s. 138(2) of the ITA is very clear and unambiguous and there is nothing confusing about this provision. The conclusion given by the High Court Judge on the effect of s. 138(2) of the ITA is correct.

[12] It is our unanimous decision that all the appeals be dismissed with costs of RM1,000 for each appeal subject to allocator.

Brief Background Facts

[13] RMDC and ROM filed OS 574 for, *inter alia*, a declaration that Andrew Kam had retired by rotation and vacated his office as their director pursuant to their respective articles of association.

[14] Andrew Kam filed OS 577 and OS 579 for an order for him to inspect the accounting records of RMDC and ROM respectively.

[15] RMDC and ROM resisted the applications on the grounds that Andrew Kam had retired and was no longer their director, and that his application was for an improper collateral purpose which would be detrimental to the companies. LEAD filed OS 609 for, *inter alia*, a declaration that Andrew Kam had retired by rotation and vacated his office as its director pursuant to its respective articles of association. GF and GK filed OS 642 for, *inter alia*, a declaration that Andrew Kam had retired by rotation and vacated his office as their director pursuant to their respective articles of association.

[16] The parties had completed the exchange of affidavits pursuant to the directions given by the High Court.

[17] Andrew Kam then obtained the respective respondents' tax documents from their tax agents without the respondents' consent or authorisation. The tax documents comprised of the respondents' tax returns, submissions, computations and/or other tax documents prepared and/or submitted by their tax agents and/or instructions received by the tax agents from them in the course of preparation of the said documents ("tax documents").

[18] There upon, Andrew Kam applied to the High Court for leave to file a supplementary affidavit exhibiting the tax documents in all the five summonses.

[19] The companies opposed the application on the grounds that: (i) the tax documents are classified material as defined in s. 138(5) of the ITA and are prohibited from being produced or used in court under s. 138(2) of the ITA; and (ii) that the tax documents are hearsay evidence and are inadmissible pursuant to O. 41 r. 5 of the Rules of Court 2012.

[20] The High Court granted leave for the filing of the supplementary affidavit but disallowed the tax documents and those parts of the affidavit referring to the tax documents and ordered that they be expunged from the court's records. Hence, these appeals.

The High Court's Decision

[21] The High Court disallowed and expunged the tax documents and those parts of the affidavit referring to them on the ground that they are prohibited from being produced or used in court under s. 138(2) of the ITA. It did not deal with the issue of hearsay.

[22] In paras. 22 to 29 of its grounds of judgment, the High Court states as follows:

> [22] It is my finding that the crux of the decision should focus on whether or not all the twenty documents as enumerated in paragraphs 11.1 and 11.2 above fall within s. 138(2) of ITA. If the answer is in the affirmative, then this court would not allow the defendant's application to use and refer to those documents for purposes of the hearing of the plaintiffs' substantive OS application. Further, it is my finding that if the answer is the affirmative, it would not be necessary for this court to decide on the plaintiffs' argument that the fresh evidence cannot be allowed for its probative value being hearsay.
>
> [23] For ease of reference I shall regurgitate s. 138 ITA in full as follows:
>
> (1) Subject to this section, every classified person shall regard and deal with classified material as confidential; and, if he is an official, he shall make and subscribe before the prescribed authority a declaration in the prescribed form that he will do so.
>
> (2) No classified material shall be produced or used in court or otherwise except:

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(a) for the purposes of this Act or another tax law;

(b) in order to institute or assist in the course of a prosecution for any offence committed in relation to tax or in relation to any tax or duty imposed by another tax law; or

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(c) with the written authority of the Minister or of the person or partnership to whose affairs it relates.

(3) No official shall be required by any court:

(a) to produce or disclose classified material which has been supplied to him or another official otherwise than by or on behalf of the person or partnership to whose affairs to relates; or

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(b) to identify the person who supplied that material.

(4) Nothing in this section shall prevent:

(a) the production or disclosure of classified material to the Auditor-General (or to public officers under his direction and control) or the use of classified material by the Auditor-General, to such an extent as is necessary or expedient for the proper exercise of the functions of his office;

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(b) the Director General from publicising, from time to time in any manner as he may deem fit, the following particulars in respect of a person who has been found guilty or, convicted of any offence under this Act or dealt with under subsection 113(2) or s. 124:

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(i) the name, address and occupation or other description of the person;

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(ii) such particulars of the offence or evasion as the Director General may think fit;

(iii) the year or years of assessment to which the offence or evasion relates;

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(iv) the amount of the income not disclosed;

(v) the aggregate of the amount of the tax evaded and penalty (if any) charged or imposed;

(vi) the sentence imposed or other order made:

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Provided that the Director General may refrain from publicising any particulars of any person to whom this paragraph applies if the Director General is satisfied that, before any investigation or inquiry has been commenced in respect of any offence or evasion falling under s. 113 or 114, that person has voluntarily disclosed to the Director General or to any authorized officer complete information and full particulars relating to such offence or evasion.

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(5) In this section:

"another tax law" means any Ordinance wholly repealed by this Act, any written law relating to estate duty, film hire duty, payroll tax or turn over tax and any other written law declared by the Minister by statutory order to be another tax law for the purposes of this section;

"classified material" means any return or other document made for the purposes of this Act and relating to the income of any person or partnership and any information or other matter or thing which comes to the notice of a classified person in his capacity as such;

"classified person" means:

(a) an official;

(b) the Auditor-General and public officers under his direction and control;

(c) any person advising or acting for a person who is or may be chargeable to tax, and any employee of a person so acting or advising if he is an employee who in his capacity as such has access to classified material; or

(d) any employee of the Inland Revenue Board of Malaysia;

"official" means a person having an official duty under or employed in carrying out the provisions of this Act.

[24] Subsection 138(2) unequivocally provides that when an income tax return or document falls within the definition of "classified material", such material is prohibited from being produced or used in court or otherwise, except if it falls within any of the exceptions enumerated in paragraphs 138(2)(a),(b) or (c) therein.

[25] The exceptions under paragraphs (a) and (b) squarely cannot apply to the defendant. I agree with the counsel for the plaintiffs that the defendant may fall within the exception in paragraph (c) only if he could show proof that he had obtained the plaintiffs' written authority to use those fresh evidence in court. The fact that the plaintiffs – whose affairs the said income tax documents relate – are opposing the defendant's application is self-evident that no such authority has been or will be given.

[26] As the defendant does not fall under any of those exceptions, it is my finding that this court is statutorily prohibited by subsection 138(2) ITA to allow the impugned documents or fresh evidence to be used in court. Such statutory prohibition further frustrates the defendant counsel's call for this court to invoke its inherent jurisdiction. On the contrary, it is based on the very reason that this court shall fulfil itself as a court of law, to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner, that it cannot transgress statutory provision, such as the mandatory prohibition envisaged by s. 138 ITA.

A [27] On the same note, this court cannot agree with the submission of the defendant's counsel that subsection 138(2) ITA does not apply against the defendant as he is not a "classified person" as defined under s. 138(5) ITA. Such a reading is, at best, blurring and confusing and does not reflect the actual intent of the legislation.

B [28] It is my finding that the defendant's counsel's reliance on the decision of Richard Malanjum J (as His Lordship then was) in *Sharif Bungsu B Sharif Zen & Anor v. PP* [1999] 1 LNS 47; [1999] MLJU 645, was misplaced. There, His Lordship was considering the evidence of the witness in respect of an income tax return of one Yaw Soon Wah when he was conducting the business of distribution of newspapers and
C stationery. His Lordship ruled that as Yaw Soon Wah's business has since been taken over by PW5, the man behind the said business is PW5 upon which the said tax returns were submitted. PW5 gave evidence on the said tax returns which were never objected by the appellant at the trial. Those tax returns were therefore allowed as the requirements of s. 138(2) of the ITA had been ruled as having complied with. The same facts did not occur
D here and thus the decision cannot apply.

[29] Based on the above considerations, it is my finding that the documents which comprise of the plaintiffs' income tax returns pursuant to s. 77A for various years of assessment and summary of income of the plaintiffs' business and partnership for various years (exhibits DSA-16, 17,
E 18, 19, 20, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 to the defendant's Supplementary Affidavit), as enumerated in paragraphs 11.1(i)-(v) and 11.2(i)-(xi) above, are documents that were made for the purposes of the ITA and relating to the income of the plaintiffs, and they contain information which had come to the notice of official of the Inland Revenue Board and the plaintiffs' tax agent, whom are both defined as
F "classified person" under s. 138 (5). These documents fell within the definition of "classified materials" as defined under s. 138(5) of the ITA and therefore shall not be allowed to be adduced in evidence before this court and shall be expunged in its entirety.

Income Tax Documents

G **[23]** It is not disputed that the documents sought to be adduced by the appellant in the said five originating summonses *vide* the supplementary affidavits are income tax documents. The tax documents are the documents mentioned in para. 11 of the learned judge's grounds of judgment.

H **[24]** For convenience, the tax documents referred to by the learned judge were as follows:

Tax documents pertaining to RMDC were:

(i) "borang nyata syarikat e-C di bawah s. 77A Akta Cukai Pendapatan 1967" Income Tax Computation Year of Assessment 2018;

I (ii) Income Tax Computation Year Of Assessment 2018;

(iii) "borang nyata syarikat e-C di bawah s. 77A Akta Cukai Pendapatan 1967" Income Tax Computation Year of Assessment 2019;

(iv) Income Tax Computation Year of Assessment 2019;

(v) "rumusan pendapatan berkanun perniagaan dan perkongsian" for the Income Tax Computation Year of Assessment of 2019.

Tax documents pertaining to ROM were:

(i) "borang nyata syarikat e-G di bawah s. 77A Akta Cukai Pendapatan 1967" Income Tax Computation Year of Assessment 2015;

(ii) Income Tax Computation Year of Assessment 2015;

(iii) "borang nyata syarikat e-C di bawah s. 77A Akta Cukai Pendapatan 1967" Income Tax Computation Year of Assessment 2016;

(iv) Income Tax Computation Year of Assessment 2016;

(v) "borang nyata syarikat e-C di bawah s. 77A Akta Cukai Pendapatan 1967" Income Tax Computation Year of Assessment 2017;

(vi) Income Tax Computation Year of Assessment 2017;

(vii) "borang nyata syarikat e-C di bawah s. 77A Akta Cukai Pendapatan 1967" Income Tax Computation Year of Assessment 2018;

(viii) Income Tax Computation Year of Assessment 2018;

(ix) "borang nyata syarikat e-C di bawah s. 77A Akta Cukai Pendapatan 1967" Income Tax Computation Year of Assessment 2019;

(x) Income Tax Computation Year of Assessment 2019;

(xi) "rumusan pendapatan berkanun perniagaan dan perkongsian" for the Income Tax Computation Year of Assessment of 2019.

[25] It is not disputed that the tax documents were obtained by the appellant from the respondents' tax agents without the respondents' consent or authorisation. The tax documents were prepared and/or submitted by respondents' tax agents and/or instructions received by the tax agents from the respondents in the course of preparation of the said documents.

[26] The learned judge in his grounds of judgment clearly confined himself to the issue whether or not all the tax documents fall within s. 138(2) of the ITA. At the High Court, the respondents challenged the correctness of the appellant's application to adduce the tax documents and alternatively, if the tax documents are not prohibited, the evidence cannot be allowed in as they constitute hearsay evidence.

[27] The learned judge did not deal with the issue of hearsay because he was of the opinion that if the answer related to s. 138(2) of the ITA be in the affirmative, then he would not allow the appellant's application to use and refer to the tax documents for purposes of the hearing of the respondents'

A substantive OS application. It would then not be necessary for him to decide on the respondents' argument that the fresh evidence cannot be allowed for its probative value being hearsay.

[28] In this appeal we are also confining ourselves to the only issue which was decided by the learned judge and which become the subject matter of the B appeal. Similarly, the submissions of the appellant and the respondents will be confined to the issue of law pertaining to the said tax documents under s. 138 of the ITA. In other words, the sole question before this court is whether the tax documents sought to be adduced by the appellant in the said five OS actions are prohibited from use in court and/or inadmissible under C s. 138 of the ITA.

Analysis/Decision

[29] The appellant's argument is that the tax documents are highly relevant to the issues in all the OS actions to show, *inter alia*, that the appellant is D indisputably a director of the respondents' companies. The appellant contended that the tax documents sought to be adduced are not "classified material" within the definition of s. 138(5) of the ITA. This is because, in the hands of the appellant, who is a director of the respondents' companies, the tax documents are company records to which the appellant is entitled to E have access under s. 245(4) of the Companies Act 2016.

[30] It was also submitted that even if the tax documents fall within the definition of "classified material" under s. 138(5) of the ITA, the appellant reiterates that the tax documents derive their confidentiality from the provisions of the ITA, and that they are confidential for the purposes, and F within the meaning of the ITA. This can clearly be gleaned from s. 138(5) of the ITA which states that '"classified material" means any return or other document made for the purposes of this Act and relating to the income of any person or partnership and any information or other matter or thing which comes to the notice of a classified person ...'.

G **[31]** It was submitted that the purpose and objective of s. 138 of the ITA as a whole is to ensure that the handling of tax submissions can be done in a smooth and efficient manner and as such, the issue of "classified material" will only arise when it comes to the notice of a "classified person" within the meaning of s. 138(5) of ITA.

H **[32]** In this regard, the appellant submitted that it is only in the hands of the Director General of Inland Revenue (DGIR), his officers and the tax agents, that the said tax documents are defined as "classified material" under s. 138 of the ITA, and the documents cannot be disclosed or admitted in court by them, except as provided in the ITA. This is the common position I taken by other Commonwealth jurisdictions in their respective tax legislation. See *Lonrho PLC v. Fayed & Ors (No. 4)* [1994] QB 775; and *Hansard* DR Bil. 19.

[33] The meaning of "classified person" under the ITA was debated in Parliament during the enactment of s. 5 of the Income Tax (Amendment) Act 1996, which was enacted to amend s. 138 of the ITA in order to include a new type of "classified person" that previously was not prescribed for under the original ITA.

[34] Based on *Hansard* DR Bil. 19, the then parliamentary secretary for the Finance Ministry had highlighted at pp. 104 to 113 that the reason for this amendment was to:

> ... membolehkan **Ketua Pengarah Hasil Dalam Negeri [DGIR]** menurunkan kuasa kepada **pegawai-pegawai Lembaga Hasil Dalam Negeri Malaysia** serta memberi mereka akses kepada material-material yang diklasifikasikan ...
>
> ... untuk menjamin urusan kutipan cukai pendapatan bawah Akta Cukai Pendapatan 1967 berjalan dengan licin dan lancar
>
> (emphasis added)

[35] The *Hansard* at the material time reflects the intention of Parliament in enacting s. 138 of the ITA. This ultimately shows that the appellant, being a director of the respondents' companies, cannot be caught within the meaning of s. 138 as this was never Parliament's intention. Without derogating from the above, the appellant submitted that s. 138 of the ITA does not bar the admissibility of the tax documents in court, regardless of how they are obtained, so long as the tax documents are relevant. The appellant's position at all times is that the tax documents were obtained legitimately and legally, and that the tax documents are relevant in the OS actions.

[36] The appellant submitted that s. 138(2) of the ITA must be read as a whole to mean the prohibition in the production or use of tax documents by "classified persons" as defined in s. 138(5) of the ITA. This interpretation is fortified by the fact that the prohibition against the use of tax documents by any person other than classified persons, as stated in s. 117(1A) of the ITA, is confined to the production and disclosure to any other person, not to the court. This is also consistent with the basic principles of production and admission of documents as laid down in *Kuruma v. R* [1955] AC 197 at p. 203 that the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.

[37] Therefore, whilst the production of tax documents in court by "classified persons" may be prohibited save for certain exceptions as stated in the ITA, such prohibition does not extend in the same way to persons other than "classified persons", such as the appellant, who is a director of the corporate respondents.

[38] *Lonrho PLC* case (*supra*) cited by the appellant says that although statute imposes clear and carefully drawn obligations of confidentiality on the revenue, there is no indication that any protection is intended to be given to documents or information in the hands of the taxpayer. In certain fields of litigation, notably personal injury claims and matrimonial causes, production of tax returns is routinely ordered. It is plain that in the hands of the taxpayer tax returns have never been treated as privileged, whereas in the hands of the revenue they always have, unless the taxpayer consents to their production. The immunity therefore only protects a taxpayer's tax papers in the hands of the revenue in fulfilment of their obligation to keep such documents secret in default of consent.

[39] We have considered the appellant's submission. In our view, firstly, the issue whether the appellant is still directors of the respondents' companies therefore is entitled to use the tax documents is not the issue before this court.

[40] The respondents in their submissions stated that the filing of OS 574 is for, *inter alia*, a declaration that the appellant has retired by rotation and had vacated his office as their director pursuant to their respective articles of association, based on the authorities of, *inter alia*, *Re Consolidated Nickel Mines Ltd* [1914] 1 Ch 883, pp. 888 to 889 [RBOA: Tab 4] and *Tan Sri Dato' Wan Sidek Wan Abdul Rahman v. Rahman Hydraulic Tin Bhd* [2012] 8 CLJ 801; [2012] 6 MLJ 681, pp. 693 to 694 [RBOA: Tab 5] which laid down the principle that when the articles of association of a company provide for retirement of directors by rotation at its annual general meeting (AGM), the director who is due for retirement at the AGM for a calendar year will retire on the last day of that year if no AGM is held for the year.

[41] We are only concerned on the reading of s. 138 of the ITA and whether the decision of the learned judge is correct. Secondly, on the confidentiality aspect of the tax documents, in our view, it is also not in issue. We agree with the appellant that the tax documents are "classified material" and we also agree on the rationale submitted by him in the submissions which also refer to the Indian and English position that the confidentiality of the documents must be protected. However, we did not agree with the appellant that anybody including him can use the tax documents in their possession and if it is admissible, the court is not concerned with how the evidence was obtained and the documents can be adduced in evidence.

[42] It is our view that the "classified material" cannot be declassified by an illegal act. Section 138(2) of the ITA operates to prohibit its use or production in court unless the taxpayer consents to their production. Section 117(1A) prohibits the appellant from using, producing or disclosing the tax documents. Section 117 of the ITA provides as follows:

117. (1) Any classified person who in contravention of s. 138: A

(a) communicates classified material to another person; or

(b) allows another person to have access to classified material,

shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding four thousand ringgit or to imprisonment for a term not exceeding one year or to both. B

(1A) Any person who receives any classified material, knowing or having reasonable ground to believe at the time when he receives it that such classified material is communicated or disclosed to him in contravention of this Act, shall not use the classified material, or produce or disclose the classified material to any other person. C

(1B) Any person who contravenes subsection (1A), shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding four thousand ringgit or to imprisonment for a term not exceeding one year or to both. D

(2) In this section "classified material" and "classified person" have the same meaning as in s. 138.

[43] It is not disputed that ITA is a taxing statute. The approach in interpreting taxing statute has been decided in *Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265; [2005] 3 MLJ 97, where Gopal Sri Ram JCA (sitting in the Federal Court) stated as follows: E

78 ... The correct approach to be adopted by a court when interpreting a taxing statute is that set out in the advice of the Privy Council delivered by Lord Donovan in *Mangin v. Inland Revenue Commissioner* [1971] AC 739: F

> First, the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices. As Turner J said in his (albeit dissenting) judgment in *Marx v. Inland Revenue Commissioner* [1970] NZLR 182 at 208, moral precepts are not applicable to the interpretation of revenue statutes. G
>
> Secondly, '... one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption so to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used'. (Per Rowlatt J in *Cape Brandy Syndicate v. Inland Revenue Commissioners* [1921] 1 KB 64 at 71, approved by Viscount Simons LC in *Canadian Eagle Oil Co Ltd v. Regeim* [1945] 2 All ER 499; [1946] AC 119). H
>
> Thirdly, the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If therefore a literal I

A interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.

Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction.

B [See: *Ketua Pengarah Hasil Dalam Negeri v. Bar Malaysia* [2022] 1 CLJ 81 at p. 90]

[44] Based on the approach in the above case, we are not wrong in saying that the purpose or intention of s. 138 of the ITA is very clear and unambiguous. Section 138(5) of the ITA provides the definition of "classified C materials" and the words "classified person" in s. 138(5) is defined under s. 138(2). These words are very pertinent. They are not to be given some other meaning.

[45] Section 138(1) of the ITA provides as follows:

D "Subject to this section, **every classified person shall regard and deal with classified material as confidential**; and, if he is an official, he shall make and subscribe before the prescribed authority a declaration in the prescribed form that he will do so."

Section 138(2) of the ITA states as follows:

E "**No classified material shall be produced or used in court** or otherwise except:

(a) for the purposes of this Act or another tax law;

(b) in order to institute or assist in the course of a prosecution for any F offence committed in relation to tax or in relation to any tax or duty imposed by another tax law; or

(c) with the written authority of the Minister or of the person or partnership to whose affairs it relates.

(emphasis added)

G **[46]** "Classified material" is defined under s. 138(5) of the ITA as follows:

"classified material" means any return or other document made for the purposes of this Act and relating to the income of any person or partnership and any information or other matter or thing which comes to the notice of a classified person in his capacity as such H ...

[47] Also, under s. 138(5) of the ITA:

"classified person" means:

(a) an official;

I (b) the Auditor-General and public officers under his direction and control;

(c) *any person advising or acting for a person who is or may be chargeable to tax, and any employee of a person so acting or advising if he is an employee who in his capacity as such has access to classified material*; or

(d) any employee of the Inland Revenue Board of Malaysia.

(emphasis added)

[48] It is not disputed that the appellant received the tax documents from the respondents' tax agent. Based s. 138(5) of the ITA above, it is very clear that the respondents' tax agent clearly falls under the definition of "classified person". Therefore, the tax documents, which are tax returns and other documents made for the purposes of the ITA and relating to the income of the companies, and/or information or other matter or thing which came to the notice of the tax agent (a classified person) in its capacity as such, are "classified material" under the ITA.

[49] As such, pursuant to s. 138(2) of the ITA, the tax documents are prohibited from being produced or used in court. We agree with the respondents that the language of the statute ("No classified material shall be produced or used ...") is imperative and therefore the prohibition is mandatory.

[50] In *Low Cheng Soon v. TA Securities Sdn Bhd* (*supra*), the Court of Appeal held that the word "shall" used in r. 18(4)(c) of the Rules of the Court of Appeal 1994 reflects a measure of mandatories in it and must be strictly adhered to. Similarly, in *Ibrahim Ismail & Anor v. Hasnah Puteh Imat & Anor And Another Appeal* [2004] 1 CLJ 797; [2004] 1 MLJ 525, 535 @ para. 12 cited by the respondents, the Court of Appeal held that the mandatory tenor of the phrase "the number of years' purchase shall be 16" employed by Parliament in ss. 7(3)(iv)(d) and 28A(2)(d) of the Civil Law Act 1956 to convey its message "exclude any pretended exercise of judicial power to substitute some other multiplier for that intended".

[51] Therefore, s. 138(2) of the ITA absolutely excludes any exercise of judicial power to admit the tax documents save only where the exceptions apply. And it is obvious that none of the exceptions apply here.

[52] The High Court was correct in holding that the exception in s. 138(2)(c) of the ITA does not apply to the appellant. Under s. 138(2)(c) of the ITA, in order to produce or use a classified material in court, the appellant must obtain written authority of "the person to whose affairs it relates". Here, "person" includes a company (see s. 2 of the ITA on the definition of "person"). It is imperative upon the appellant to obtain written authority or consent from the respondents before he may produce their tax documents in court. The respondents submitted that their opposition to the appellant's application is self-evident that no such written authority has been or will be given to him.

[53] The High Court was correct in rejecting the appellant's contention that s. 138(2) of the ITA does not apply against him as he is not a "classified person" as defined under s. 138(5) of the ITA. The appellant has obtained the classified material which were prepared for the purpose of the ITA (the tax documents) from the classified persons (the tax agents) without the consent and authority of the tax payers (the respondents) and therefore in contravention of s. 138(1) of the ITA.

[54] We also agree with the learned judge's analysis of the case of *Sharif Bungsu Sharif Zen & Anor v. PP* [1999] 1 LNS 47; [1999] MLJU 645 relied on by the appellant. In this *Sharif Bungsu*'s case the court held in no uncertain terms that "such provision is intended for the benefit of the tax payer, probably for confidentiality reason ...". In that case, the tax payer's lawful representative was the one who produced the relevant tax documents in court and no objection was taken at the trial. The court was merely concerned with the issue whether written authority from the tax payer was still required for the production of the tax documents in such circumstances. In the present case, the tax payers themselves object to the production of the tax documents. The case can be distinguished on its facts.

[55] On the admissibility of evidence, it is not disputed that the Evidence Act 1950 is a statute that applies generally to the admission of evidence. Section 138(2) of the ITA is a specific provision that governs the production and admissibility of a specific category of documents. Applying the *maxim generalibus specialia non derogant*, s. 138(2) overrides any rule governing the admissibility of evidence including common law principles relating to admissibility of illegally obtained evidence.

[56] As correctly submitted by the respondents, the case on point is *PP v. Chew Siew Luan* [1982] CLJ 354; [1982] CLJ (Rep) 285; [1982] 2 MLJ 119, pp. 119 to 120 where the Federal Court held as follows:

> On appeal by the Public Prosecutor against the order so made granting bail the learned judge dismissed it stating that s. 41B(1)and (2) of the Dangerous Drugs Act does not override the proviso to s. 388(i) of the Criminal Procedure Code. He seemed to think that s. 41B of the Act should not be construed as having the effect of fettering the discretion to grant bail under the provisions of the Criminal Procedure Code in cases covered by the proviso to s. 388(i) thereof. Section 41B(1) of the Dangerous Drugs Act provides:
>
> (1) Bail shall not be granted to an accused person charged with an offence under this Act:
>
> (a) where the offence is punishable with death; or
>
> (b) where the offence is punishable with imprisonment for more than five years; or

(c) where the offence is, punishable with imprisonment for five years or less and the Public Prosecutor certifies in writing that it is not in the public interest to grant bail to the accused person.

(2) The provisions of subsection (1) shall have effect notwithstanding any other written law or any rule of law to the contrary.

Now, the Criminal Procedure Code (F.M.S. Cap. 6) which came into force on 1.1.1927 is an enactment regulating criminal proceedings in general in the former Federated Malay States. It was amended and extended throughout Malaysia by the Criminal Procedure Code (Amendment and Extension) Act 1976 on 10.1.1976. It cannot be gainsaid that it is a written law within the meaning assigned in section 2 of the Interpretation Act 1967.

The Dangerous Drugs Act 1952 (Revised – 1980) is an Act specifically designed to regulate the importation, exportation, manufacture, sale and use of, *inter alia*, dangerous drugs, and "to make special provisions relating to the jurisdiction of courts in respect of offences thereunder and their trial, and for purposes connected therewith". In other words, the Act is in substance a special law passed by Parliament in derogation of the rights of a person concerning the granting of bail in an otherwise ordinary case. We further note in particular that s. 41B of the Act is an entirely new section introduced by the Dangerous Drugs (Amendment) Act, 1978 (Act A426) and became operative on 10.3.78. ***Generalibus specialia derogant* is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law**. (See also *Public Prosecutor v. Chu Beow Hin* [1982] 1 MLJ 135 137). The provisions of s. 3 of the Criminal Procedure Code which counsel for the respondent seeks to rely on has no relevance whatsoever to the matter in issue before us.

It would be erroneous to apply expressions used and provisions made in one statute to another and entirely different one in complete disregard of the latter's express stipulations in the light of its specific purpose and object.

On the other hand, it is a sound, and, indeed, a well-known principle of construction of a statute that the purport of words and expressions used in a legislative measure must take their colour from the context in which they appear. We do not therefore agree with the learned judge that it is open to a court to subject the express provisions regarding bail in s. 41B of the Dangerous Drugs Act to the provisions relating thereto in the Criminal Procedure Code. The provisions regulating the granting of bail under the Dangerous Drugs Act must be construed in the context of that Act and not in that of the Criminal Procedure Code and to that extent the general provisions of the Criminal Procedure Code must *ex necessitate* yield to the specific provisions of s. 41B of the Dangerous Drugs Act in that regard. We should perhaps also observe *en passant* that any other construction would result in nullifying the purport and effect of the provisions of s. 41B(1)(c) of the Dangerous Drugs Act and render

A *otiose* and ineffective a certificate of the Public Prosecutor thereunder that it is not in the public interest to grant bail to a person accused of an offence under the Dangerous Drugs Act punishable with imprisonment for five years or less.

(emphasis added)

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Conclusion

[57] The principles upon which an appellate court will act in reviewing the decision by a lower court is fully settled that appellate interference would only justify in situation when the trial court has been plainly wrong.

C [See: *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1; *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309]

[58] In the circumstances, we agree with the High Court decision that the tax documents shall not be allowed to be adduced in evidence and to be
D expunged in its entirety on grounds that the tax documents are documents that were made for the purposes of the ITA and relating to the income of the respondents, and they contain information which had come to the notice of official of the inland revenue board and the respondents' tax agent, both of whom are defined as "classified person" under s. 138(5) of the ITA. These
E documents fall within the definition of "classified materials" under s. 138(5) of the ITA.

[59] We affirm the decision of the High Court and it is our unanimous decision that the appellant's appeal be dismissed with costs of RM1,000 for each appeal subject to allocator.

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